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No. 80-1494

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

UNITED AIR LINES, INC.,
Petitioner,

vs.

THE DIVISION OF INDUSTRIAL SAFETY OF THE DEPARTMENT OF INDUSTRIAL RELATIONS OF THE STATE OF CALIFORNIA and THE OCCUPATIONAL SAFETY & HEALTH APPEALS BOARD FOR THE STATE OF CALIFORNIA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Respondent Division of Industrial Safety (now entitled Division of Occupational Safety and Health and hereinafter referred to as Division or Cal/OSHA) respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Petitioner United Airlines, Inc. (hereinafter referred to as United) to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 2, 1980, in Case No. 79-4489, *United Airlines, Inc. v. the Division of Industrial Safety of the Department of Industrial Relations of the State of Cali-*

fornia and the Occupational Safety and Health Appeals Board for the State of California. The issue presented by United is whether the United States Court of Appeals properly determined that United's complaint failed to establish subject matter jurisdiction pursuant to 28 U.S.C. sections 1331 and 1337. The Division maintains that the Ninth Circuit's decision applied well established precedent which has concluded that federal question jurisdiction is not conferred when the federal question appears in the complaint as an anticipation of a probable defense to state action or there is a mere reference to federal law in a state statute. Given that the subject decision is consistent with prior articulation of federal question jurisdiction by this Court and other Courts of Appeals, the Division maintains that United has failed to fulfill the criteria expressed in Supreme Court Rule 19(1)(b) to justify review by way of certiorari.

STATEMENT OF THE CASE

On May 9, 1979, United filed in the United States District Court for the Northern District of California a complaint for declaratory and injunctive relief against the Division and the Occupation Safety and Health Appeals Board (hereinafter referred to as Appeals Board).[1]

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[1]United's allegation in its initial statement of the case that Cal/OSHA's enforcement of occupational safety and health law usurps the jurisdiction of the Federal Aviation Administration (hereinafter referred to as FAA) is not only argumentative but incorrect. All Division actions with reference to United have been limited solely to the safety and health of ground employees. The Division has never attempted to exercise any authority over flight personnel or the airplane itself. With reference to the airline's maintenance manuals which ostensibly in part cover safety matters,

The complaint requested the entry of a declaratory judgment holding that United's San Francisco Operations and Maintenance facility was not under the jurisdiction of the Division and the entry of a preliminary injunction restraining and enjoining (1) the Division from inspecting, regulating or enforcing its jurisdiction over United's San Francisco Operations and Maintenance facility, and (2) the Appeals Board from hearing and deciding any matters related to the enforcement of citations issued by the Division to United at this facility. (United's Petition, Appendix page 22A) The complaint filed by United stated that there was a State Court action, a Writ of Mandate,

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Langhorne Bond, Administrator of the FAA, stated in writing in response to questions presented by the Subcommittee on Government Activities and Transportation for the House Committee on Government Operations that:

> The operations manual, the areas which must be covered therein, and its distribution are all required by regulation. Also, the procedures contained in the manual may not be contrary to any FAA regulation. Apart from these requirements, the procedures set forth in the manual are not of a regulatory nature. Failure of an operator's employee to follow a procedure specified in the manual may result in company disciplinary action against the employee but cannot serve as the basis for FAA enforcement action unless failure to follow the procedure specified has also resulted in a violation of a Federal Aviation Regulation. (This material was submitted as an appendix to the Division's Motion for a Stay Pending Appeal to the Ninth Circuit and appears in the appendix at pages 1-3.)

United has not pointed once in the course of either the state or federal proceedings to one specific Federal Aviation Regulation (hereinafter referred to as FAR) pertaining to safety requirements for ground maintenance personnel. The reason is simple; with the exception of rules pertaining to transportation of hazardous substances, there are none. Given the Administrator's statement that the maintenance manuals are not considered to be of a

filed in the Superior Court in and for the City and County of San Francisco, which had been proceeding since December 26, 1978 (United's Petition, Appendix page 19A). It also stated that there were two administrative hearings concerning safety violations at United's Operations and Maintenance facility at the San Francisco Airport which were then pending before the Appeals Board. (United's Petition, Appendix pages 19A and 20A)[2]

On June 4, 1979, the Division and Appeals Board, filed a Motion to Dismiss. On July 26, 1979, the matter was heard by the United States District Court, which granted United's Motion and issued a preliminary injunction. (United's Petition, Appendix page 43A) On August 6, 1979, the Division and Appeals Board noticed an appeal and a motion for a stay of the preliminary injunction pending appeal. A minute order was entered on August 31, 1979 by the District Court denying the motion to stay the injunction pending appeal.

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regulatory nature, there can hardly be an usurpation by Cal/OSHA of FAA jurisdiction in the area of safety and health of ground maintenance employees.

[2]With reference to these actions, United's Petition for Writ of Mandate challenging the affirmance of a Division citation by the Appeals Board, which Petition was premised on jurisdictional grounds, was heard in San Francisco Superior Court on June 30, 1980; subsequently on September 11, 1980, Judge Ira A. Brown Jr. issued his decision which denied United's Writ in challenge to Cal/OSHA jurisdiction. (Appendix, page 4) United subsequently sought a Motion for Reconsideration from the Order denying its Writ of Mandate, which Motion was premised in its entirety on the decision by the Occupational Safety and Health Review Commission in *Northwest Airlines, Inc.*, Docket No. 13649, CCH OSHD ¶ 24,751 (1980). A hearing was held in reference to this matter

Subsequently, the Division and Appeals Board filed for a stay of the preliminary injunction with the Ninth Circuit Court of Appeals on October 29, 1979. On January 25, 1980, the Motion for a Stay Pending Appeal by the Division and Appeals Board was granted by the Ninth Circuit. Extensive briefs were filed by the parties with the Ninth Circuit and oral argument was heard on August 12, 1980; the Ninth Circuit on December 2, 1980, issued its decision which determined that the District Court Order granting a preliminary injunction must be reversed in that its suit was plainly based on state law and that federal question jurisdiction was not established.

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on October 9, 1980, and at the hearing Judge Brown from the bench denied United's Motion for Reconsideration of his decision. An Order denying reconsideration and a judgment denying the writ were entered on October 24, 1980. (Appendix, pages 5-8) United subsequently noticed its intent to appeal this decision to the First District Court of Appeal for the State of California. With reference to the administrative actions before the Appeals Board the first matter pertaining to a citation for failure to repair cargo equipment came to hearing on December 2, 1980; a decision by an administrative law judge for the Appeals Board was issued on February 4, 1981, which upheld the citation and concluded that there was a valid exercise of Division jurisdiction. *United Airlines*, Docket No. 77-R1D3-658 (February 4, 1981) (Appendix, pages 9-15) United subsequently filed a Petition for Reconsideration with the Appeals Board as a whole seeking a reversal of this decision. The second matter pertaining to a citation for failure to provide proper foot protection for employees came to hearing initially on February 17-20, 1981, and is scheduled to be completed in April or May of this year.

ARGUMENT

I

THE NINTH CIRCUIT COURT OF APPEALS ARTICULATED WELL ESTABLISHED PRINCIPLES OF LAW IN ITS DETERMINATION THAT UNITED'S COMPLAINT FAILED TO PRESENT A FEDERAL QUESTION

The decision by the Ninth Circuit that federal question jurisdiction was not established in United's complaint was premised upon two lines of decisions, which will be discussed after the theory of United's claim for injunctive relief is briefly reviewed. United's attempt to enjoin the enforcement of state occupational safety and health laws was based upon its argument that there was a *statutory* preemption pursuant to the terms of state law. California Labor Code 6307 sets forth the jurisdiction of the Division:

> The division has the power, jurisdiction and supervision over every employment or place of employment in this state.

The term "place of employment," which defines the areas over which the Division may assert jurisdiction and establishes certain exemptions from the exercise of jurisdiction, is found in California Labor Code 6303(a) which provides:

> "Place of employment" means any place and the premises appurtenant thereto, where employment is carried on except a place the health and safety jurisdiction over which is vested by law in, and actively exercised by, any state or federal agency other than the division.[3]

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[3]The derivation of the definition of place of employment is found in an amendment to workers compensation and safety legislation in Stats. 1917, Ch. 586, page 861, section 33. The definition was

United argued that jurisdiction was properly before the Federal District Court because there was both a federal question and an action arising under an Act of Congress regulating commerce. United alleges that the federal statute under which the so-called action arises is the Federal Aviation Act of 1958, 49 U.S.C. section 1301 et seq. The Division has consistently maintained that this assertion is completely inaccurate. The California Occupational Safety and Health Act from which United seeks relief is a state law set forth in the California Labor Code. Labor Code section 6300 *et seq.*

In its Opposition to Motion for a Stay Pending Appeal with the Ninth Circuit, United stated:

> This action involves an analysis of the duties and responsibilities of the Federal Aviation Administration ("FAA") under the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1301, *et seq.* ("Aviation Act"), and the effect which the carrying out of those duties and responsibilities has on the jurisdiction of Cal/OSHA, under its organic statute, the California Labor Code §§ 148-149, 6300 *et seq.* It is not a case of federal preemption; it is a case of statutory preemption since *the law* requires that the proper exercise of FAA

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codified as former Labor Code 6302 by Stats. 1937, Ch. 90, page 306, section 6302. Beyond the minor amendments to this section by Stats. 1945, Ch. 1431, page 2699, section 99, and the renumbering of the section to 6303(a) by Stats. 1973, Ch. 993, section 46, the section has remained in substantially similar form until the amendments in Stats. 1978, Ch. 1248, section 1, in which the words "health" and "and actively exercised" were added to the statutory definition. As can be seen, the definition of this term for purposes of California worker safety legislation long predated the enactment of the federal Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*

> jurisdiction precludes the continuing exercise of Cal/OSHA jurisdiction in the same "place of employment." (This statement appears on page 7 at lines 6-16 of United's Opposition to Motion for Stay Pending Appeal and at the Appendix at page 17.) (emphasis added)

The law to which United is referring is the exemption from Cal/OSHA jurisdiction set forth in California Labor Code section 6303(a). "Federal" is the only word in the state statute which is the lynchpin of United's argument that the case arises under federal law. Given this background, the Court of Appeals properly concluded that federal question jurisdiction was not created when federal law was relevant, at most, as an affirmative defense to state law. *Public Service Commission of Utah v. Wycoff Company, Inc.*, 344 U.S. 237, 248 (1952); *Home Federal Savings and Loan Association v. Insurance Department of Iowa*, 571 F.2d 423, 426 (8th Cir. 1978). As a corollary, subject matter jurisdiction is not conveyed when the federal question appears in a complaint in anticipation of probable defenses in an answer. *Phillips Petroleum Company v. Texaco*, 415 U.S. 125, 128 (1974); *Skelly Oil Company v. Phillips Petroleum Company*, 339 U.S. 667, 673-74 (1950).

The Division argued and the Court of Appeals concluded that the facts presented in the present case were extremely similar to the factual pattern in the Eighth Circuit decision in *Home Federal Savings and Loan Association v. Insurance Department of Iowa, supra. United Airlines, Inc. v. Division of Industrial Safety of the Department of Industrial Relations*, 633 F.2d 814, 817 (9th Cir. 1980). In that case the plaintiff alleged as a matter of federal preemption that the

State of Iowa could not exert jurisdiction over its operations; in this case United similarly argues that as a result of statutory preemption the state may not assert jurisdiction over its operations. In both cases the federal question was raised only in the context of a defense which could be brought up at enforcement proceedings. The determination by the Ninth Circuit in its *United* decision, *supra,* is consistent with prior precedents of this Court and the Eighth Circuit Court of Appeals that federal question jurisdiction cannot be established in the context of federal law appearing as a defense to the application of state law.

The second major premise relied upon by the Court of Appeals in deciding that federal question jurisdiction was not conferred was the conclusion that a state statute's reference to a federal statute as prescribing the rule and measure of the rights granted by the State does not make the determination of such rights a federal question. The definition of place of employment, which exempts from Cal/OSHA jurisdiction those places in which another federal agency is both vested by law with safety and health jurisdiction and actively exercises that jurisdiction, at most references federal law. However, the reference and possible incorporation of federal law would not springboard the California statutory provision to the status of a federal question sufficient to establish subject matter jurisdiction. *Moore v. Chesapeake and Ohio Railway,* 291 U.S. 205 (1934), *Louisville and Nashville Railway v. Western Union Telegraph Company,* 237 U.S. 300, 303 (1915), *Miller's Executor's v. Swann,* 150 U.S. 132, 136-137 (1893), *Morse v. Danna,* 411 F. Supp. 1300, 1305-1306 (D.Minn. 1976), affirmed 547 F.2d 436 (8th Cir. 1977).

The tests for determining jurisdiction pursuant to 28 U.S.C. section 1337, cases arising under any Act of Congress regulating commerce, are the same as those for determining jurisdiction under 28 U.S.C. section 1331. Thus, United's attempt to invoke federal question jurisdiction under section 1337 was also improper because the only legal construction which can either support or adversely impact United's claim is the construction of a *state law*, not the Federal Aviation Act. The fact that the Federal Aviation Act is indirectly involved is not sufficient to raise federal subject matter jurisdiction. *Molton, Allen and Williams, Inc. v. Harris*, 436 F. Supp. 853 (D.D.C. 1977); *Eickhof Construction Company v. Great Northern Railway Company*, 291 F. Supp. 44, 47 (D.Minn. 1968).

In conclusion, the decision by the Ninth Circuit in the *United* case, *supra*, articulates well established rationales for its determination that federal question jurisdiction was not established in the complaint and is consistent with relevant decisions of this Court and other Courts of Appeals.

II

UNITED'S COMPLAINT, AND THE ARTICULATION OF THAT COMPLAINT IN ITS BRIEFS, FAILED TO SET FORTH FEDERAL QUESTION JURISDICTION

Throughout its complaint, most notably in paragraphs 6, 11 and 15, and in paragraph A of its prayer for relief, (United's Writ, Appendix, pages 14A and following), United makes clear that its complaint for declaratory and injunctive relief is premised upon its belief that the Di-

vision is precluded from exercising jurisdiction over its facilities based upon the definition of place of employment in California Labor Code 6303(a) and United's corollary argument that the Federal Aviation Act of 1958, 49 U.S.C. section 1301 et seq., constitutes legal authority for an exemption from Cal/OSHA jurisdiction pursuant to the terms of the subject Labor Code section. The Ninth Circuit Court of Appeals concluded that "jurisdiction does not appear in plaintiff's complaint in this case." *United Airlines, supra,* 633 F.2d at 815. United in turn argues that "the Court of Appeals simply ignored United's complaint." (United's Writ, page 16) We would urge, however, that United itself ignored and subsequently limited its statement of jurisdictional grounds set forth in the complaint. In paragraph 2 of its complaint United claims that jurisdicion is based

> on the federal question raised by the matters alleged in this complaint, 28 U.S.C. section 1331; diversity of citizenship, 28 U.S.C. section 1332; and the federal preemption which arises by virtue of an Act of Congress regulating commerce, 28 U.S.C. section 1337. (United's Writ, Appendix, page 15A)

With reference to its alleged claim of diversity jurisdiction, after we pointed out in our opening brief that this proposition was untenable, citing *Moore v. County of Alameda,* 411 U.S. 693 (1973) and *Postal Telegraph Cable Company v. Alabama,* 155 U.S. 482, 487 *(1894)* (emphasis added), United admitted in its responsive brief before the Ninth Circuit that it "mistakenly asserted jurisdiction under 28 U.S.C. section 1332." (This statement appears in Footnote 5 on page 8 of United's brief and in Appen-

dix at page 19.) Similarly, with reference to United's claim that there was federal preemption which arose by virtue of an Act of Congress regulating commerce pursuant to 28 U.S.C. section 1337, United subsequently in its Opposition to Motion for a Stay Pending Appeal with the Ninth Circuit stated

> It is not a case of federal preemption; *it is a case of statutory preemption* since the law requires that the proper exercise of FAA jurisdiction precludes the continuing exercise of Cal/OSHA jurisdiction in the same "place of employment". (This statement, previously referred to, appears on page 7 at lines 12-16 of United's Opposition to Motion for Stay Pending Appeal and in Appendix at page 17.) (Emphasis added.)

Certainly at this juncture United cannot be heard to recant its own limitations on the jurisdictional theories initially enunciated in its complaint.

In any event, United articulates an argument that pursuant to the terms of the Federal Occupational Safety and Health Act, 29 U.S.C. 651 et seq., Cal/OSHA is federally preempted from exceeding the bounds of subject matter jurisdiction as articulated in section 4(b)(1) of the Act, 29 U.S.C. section 653(b)(1). United's apparent rationale is that since the California Occupational Safety and Health Act is authorized by the Federal Occupational Safety and Health Act and since there are some administrative decisions rendered by the Federal Occupational Safety and Health Review Commission which hold that section 4(b)(1) of the Federal Act requires Federal OSHA to defer health and safety jurisdiction to other federal

agencies under certain circumstances, that therefore, the Division must defer jurisdiction under the same circumstances. United asserts, without any authority being cited, that "the jurisdictional reach of the OSHA Act into the interstate commerce of United and other employers cannot be exceeded by the jurisdictional reach of an approved state plan." (United's Writ, page 7.) United's contention is completely unmeritorious for several reasons. To begin with, the theory of the provision in the Federal Occupational Safety and Health Act which permits state plans and the assumption of state jurisdiction is premised upon only minimum standards being fulfilled. The most significant part of Section 18, which authorizes state plans, with respect to this argument is the requirement that the state statutory scheme "for the development and *enforcement* of safety and health standards relating to one or more safety or health issues . . . will be at least as effective in providing safe and healthful employment and places of employment" as the federal program. 29 U.S.C. 667(c)(2). (Emphasis added.) The law does not say "the same say as" or "as restrictive as." The statute sets only a minimum standard; nothing in the federal law requires regulations and the enforcement of regulations in state plans to be uniform with one another or with federal law. As stated earlier, the derivation of the definition of place of employment in California Labor Code 6303(a), which establishes the confines of Cal/OSHA jurisdiction, extends back to the year 1917. When California submitted a state plan, which was approved in 1972, and adopted the California Occupational Safety and Health Act in 1973, the only requirement was that the coverage of the Cal/OSHA program would be at

least as effective in providing safety and health protection as would be accorded under the federal Act.

The Federal Occupational Safety and Health Administration (hereinafter referred to as Fed/OSHA), which is responsible for administering and enforcing State Plan requirements has interpreted the permissible jurisdictional scope of State Plans pursuant to Section 18, 29 U.S.C. 667, in accord with the Division. In Fed/OSHA Program Directive No. 77-5, dated October 30, 1978, pertaining to the Reference Book on Jurisdictional Issues, the following statement is made:

> However, Section 4(b)(1) limitations are strictly binding only on the Federal program. Therefore, a State may choose to exercise greater jurisdiction under its own law than is allowed to Federal OSHA. Any maximum limitation on State jurisdiction would be determined under the State law and other Federal law and applicable court decisions. (Appendix, page 21)

Moreover, the term "employer" in the federal Act is defined to exclude the United States or any state or political subdivision of the state, 29 U.S.C. 652 (5). Whereas the federal program is thus precluded from exercising subject matter jurisdiction over public employers, Section 18 of the federal Act requires that state plans to the extent permitted by state law provide effective and comprehensive coverage to all employees of public agencies. 29 U.S.C. 667(c)(6). To that end, the California program, with the exception of the assessment of civil penalties, California Labor Code 6434, applies equally to both public and private employers. California Labor Code 6304 (in which "employer" is defined to have the same meaning as California Labor Code 3300 which includes both public and private

employers.) In this manner, Cal/OSHA's jurisdiction extends to a subject matter not covered by the Federal Act.

Section 18(a) of the federal Act provides that a state may exercise jurisdiction *carte blanche* over any occupational safety or health issue with respect to which no standard is in effect under section 6. 29 U.S.C. 667(a). Thus, California has the prerogative of enforcing outside the confines of an approved state plan, if it so desired, regulations pertaining to safety and health issues which were not subject to coverage by a federal standard. Assuming arguendo that section 18(b) were not applicable and that Federal OSHA did not have jurisdiction over a particular place of employment, a state would not be precluded from exercising jurisdiction over such a place of employment to the extent that there was no federal standard in effect.

We find it curious that United cites as authority for resolution of the jurisdictional question the three leading Courts of Appeals decisions which analyzed OSHA jurisdiction over railroad operations. *Southern Railway Company v. Occupational Safety and Health Review Commission,* 539 F.2d 335 (5th Cir. 1976), *Southern Pacific Transportation Company v. Usery,* 539 F.2d 386 (5th Cir. 1976), *Baltimore and Ohio Railroad Company v. Occupational Safety and Health Review Commission,* 548 F.2d 1052 (DCCA 1976). In each of these decisions, in which challenges to OSHA jurisdiction over railroad operations pursuant to Section 4(b)(1) of the Act, 29 U.S.C. 653(b)(1), were rejected, the Courts of Appeals unanimously concluded that there was no industry-wide exemption from OSHA jurisdiction. (In each of these decisions, the Courts also rejected the railroad's argument that the Federal Rail-

road Administration's notice of intended rule making constituted an exercise of jurisdiction.) Of course, what United sought through its complaint for injunctive relief amounted to an industry-wide exemption over its entire operations and maintenance facilities at San Francisco International Airport. With reference to a similar attempt by another airline to obtain an industry-wide exemption, the Second Circuit Court of Appeals stated:

> The airline asks this Court to conclude that an entire hanger, and the multitude of possible hazards within it, are excluded from OSHA protection. Given the breath of the problem, our inquiry would of necessity be amorphous, unwieldy and lacking of expertise. In contrast, following an OSHA inspection and its administrative review, the issues will be greatly refined, and we will be made aware of the specific types of hazards that OSHA officials believe that are regulated by the FAA. *Marshall v. Northwest Orient Airlines, Inc.*, 574 F.2d 119, 122 (2nd Cir. 1979).

Thus in all relevant cases dealing with OSHA jurisdiction, no Court of Appeals has seen fit to grant an industry-wide exemption from OSHA jurisdiction.[4]

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[4]United's reliance upon *Weyerhaeuser v. Marshall*, 592 F.2d 373 (7th Cir. 1979) and *Continental Can Company v. Marshall*, 603 F.2d 590 (7th Cir. 1979) is misplaced. The former case dealt with a challenge to an inspection warrant which the court ultimately concluded did not set forth sufficient probable cause to permit an inspection; the second case dealt with OSHA's continuing efforts to enforce noise citations at Continental's facilities, which were similar with respect to noise problems, after OSHA had already lost before the Federal Occupational Safety and Health Review Commission a prior case concerning the same issue. Neither case cited by United dealt with the jurisdictional issue. However, both *Marshall v. Northwest Orient Airlines*, supra, and *Marshall v. Bur-*

Lastly, United argues that a recent decision by the Federal Occupational Safety and Health Review Commission, *Northwest Airlines, Inc., supra,* which vacated an OSHA citation requiring modification of the wing flaps of an airplane, on jurisdictional grounds pursuant to Section 4(b)(1), 29 U.S.C. 653(b)(1), constitutes a binding interpretation on Cal/OSHA jurisdiction pursuant to California Labor Code 6303(a). The Division maintains that this contention is incorrect for several reasons. The facts in the federal case differ substantially from those raised in the state proceedings. But most importantly, the statutory language creating exemptions from Cal/OSHA jurisdiction in California Labor Code 6303(a) differs from the terms of the comparable federal provision in Section 4(b)(1) of the Act, 29 U.S.C. 653(b)(1). The California statute requires that there not only be vesting of safety and health jurisdiction in another agency but there must also be an active exercise of that jurisdiction to preclude Cal/OSHA coverage.[5]

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lington Northern, Inc., 595 F.2d 511 (9th Cir. 1979) stand for the proposition that administrative remedies must be exhausted before the federal court considers the question of an agency's jurisdiction.

[5]United contended that pursuant to its affidavits the FAA could be said to have actively exercised jurisdiction at its facilities. United also claimed that the Division has never challenged this contention, nor could it. This allegation is incorrect. Because of what we perceived to be the glaring procedural infirmities of United's complaint for preliminary injunction and declaratory relief, the Division and Appeals Board did not respond to the complaint on the merits but instead filed a motion to dismiss, which argued among other things that there was no federal question jurisdiction, that there was a failure to exhaust administrative remedies, and that the court should abstain to permit California courts to first interpret a relevant state statute. These arguments were reiterated subsequently in the appeal to the Ninth Circuit. How-

In any event United will have the opportunity to raise its contention concerning the impact of this case in the forthcoming appeal before the California First District Court of Appeal, which will have the opportunity to construe the breadth and reach of this critical California Labor Code provision.

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ever, in reference to the issue of the exercise of FAA jurisdiction in the administrative proceedings which have heretofore been held before the Appeals Board, United has not once been able to point to an enforcement action undertaken by the FAA prior to an occupational safety and health issue being addressed by the Division. The absence of any past history of FAA involvement with safety and health issues was one of the primary reasons relied upon by the Appeals Board in its Decision after Reconsideration which upheld the citation issued to United Airlines. United Airlines—SFOCG, Docket No. 76-R1D3-878 (November 27, 1978) (This decision appears in the Appendix at pages 24-28.) [This decision was the subject of the petition for writ of mandate in San Francisco Superior Court, in which the Appeals Board's decision was upheld. The case has been noticed for appeal by United Airlines in the California First District Court of Appeal.] In the most recent decision involving United by an administrative law judge, which upheld the Division citation for failure to repair cargo equipment, the Division produced evidence that an employee had submitted a formal complaint concerning this condition in December 1975, that nothing was done to eliminate the hazard until after the Division's inspection in June 1977, and only after the Division citation did United Airlines itself request that the FAA conduct an inspection. *United Airlines*, Docket No. 77-R1D3-858 (February 4, 1981), appeal pending on reconsideration before the Appeals Board. (This decision appears in the Appendix at pages 9-15) The Division would suggest that there is a difference concerning the weight to be accorded affidavits not subject to cross-examination and testimony at an administrative proceeding subject to the rigors of the adversarial process.

CONCLUSION

For the reasons stated, Respondent Division of Occupational Safety and Health respectfully prays that the Petition for Writ of Certiorari to review the Ninth Circuit Court of Appeals' decision not be granted.

The Division's opposition to the Petition for Writ of Certiorari has been discussed with the Occupational Safety and Health Appeals Board and its attorney, Robert Heron, who has represented the Appeals Board in prior proceedings pertaining to this case. The positions and arguments herein set forth have been fully concurred in by authorization of the Appeals Board.

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(Appendix A follows)

APPENDIX A

Airline Deregulation and Aviation Safety

Hearings
Before a
Subcommittee of the
Committee on
Government Operations
House of Representatives
Ninety-Fifth Congress
First Session

September 8 and 9, 1977

Printed for the use of the Committee
on Government Operations

Operator's Manuals

Operator's manuals are required by section 121.133 of Part 121 of the FARs.

The required contents for these manuals are set forth in section 121.135, and the required distribution of these manuals is specified in section 121.137.

Generally it is a requirement that an operator must have a manual available for every person connected with the operation of aircraft. This includes crewmembers, appropriate ground operations and maintenance personnel and representatives of FAA assigned to the operator for certificate surveillance duties.

Mandatory topics for manual inclusion are outlined in the regulations. However, operators usually have added other items that their operating experience has shown to be useful for their specific operations.

The operations manual may be modified by the operator without prior FAA review and approval. However, a copy of the operations manual as well as any changes thereto must be furnished the FAA certificate holding office. If any phase of the manual does not meet regulatory standards, this is brought to the attention of the operator and a solution is worked out. If the FAA does not contact the operator relative to a change, this indicates tacit approval. It is important to note, however, that, in actual practice, for any substantive change in policy, an operator with a good working relationship with the FAA certificate holding office will obtain FAA suggestions about the change prior to publication.

The operations manual, the areas which must be covered therein, and its distribution are all required by regulation. Also, the procedures contained in the manual may not be contrary to any FAA regulation. Apart from these requirements, the procedures set forth in the manual are not of a regulatory nature. Failure of an operator's employee to follow a procedure specified in the manual may result in company disciplinary action against the employee but cannot serve as the basis for FAA enforcement action unless failure to follow the procedure specified has also resulted in a violation of a Federal Aviation Regulation.

There would be no basis to deny a modification to an operations manual if the proposed procedures were consistent with FAA regulations. If a proposed change were to make a procedure less stringent than required by regulations, however, the operator would be advised that operation under the provision would result in regulatory enforcement action.

Monitoring to ensure compliance with procedures outlined in an operator's operations manual is a part of an inspector's surveillance responsibility. Since any inspector assigned surveillance duty on a carrier must have access to that operator's manual, he is familiar with the company procedures outlined therein. Any person who operates in nonconformance with those procedures will be reported to POI and company management will be advised by the POI.

Superior Court of the State of California
for the City and County of San Francisco

Department 9

In Open Court

September 11, 1980

No. 747-454

United Air Lines, Inc.
Plaintiff.

vs.

The Occupational Safety Board and
Health Appeals Board,
Defendant.

Petitioner United Air Lines' petition for writ of mandate, heretofore submitted, is denied.

Costs to respondent.

/s/ IRA A. BROWN, JR.
Judge of the Superior Court

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City and County of San Francisco

No. 747-454

United Air Lines, Inc.
Petitioner,

vs.

The Occupational Safety and Health Appeals Board,
Respondent,

The Division of Occupational Safety and Health,
Real Party in Interest.

[Filed October 31, 1980]

ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER DENYING WRIT OF MANDATE

The motion of petitioner, United Air Lines, Inc., for reconsideration of the Order of September 11, 1980, deny-

ing a petition for writ of mandate in the above-entitled matter, having been heard on October 9, 1980, the parties being represented by counsel, and good not cause having been shown,

IT IS HEREBY ORDERED that the Motion for Reconsideration of Order Denying Writ of Mandate be, and the same hereby is, denied in all respects.

Dated: October 24, 1980.

IRA A. BROWN, JR.
Judge of the Superior Court

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City and County of San Francisco

No. 747-454

United Air Lines, Inc.
Petitioner,

vs.

The Occupational Safety and Health Appeals Board,
Respondent,

The Division of Occupational Safety and Health,
Real Party in Interest.

[Filed Oct. 27, 1980]

JUDGMENT DENYING PEREMPTORY WRIT OF MANDAMUS

This matter came regularly before this Court on May 19, 1980, and June 30, 1980, for hearing. Paul M. Tschirthart

appeared as attorney for Petitioner; Robert A. Heron appeared as attorney for Respondent; and Michael D. Mason appeared as attorney for Real Party in Interest. The record of the administrative proceedings having been received into evidence and examined by the Court, the Court having taken judicial notice of the September 27, 1977, letter from the Honorable John L. Burton, Chairman, Subcommittee of the Committee on Government Operations, House of Representatives, United States Congress, and the October 14, 1977, response from the Honorable Langhorne Bond, Administrator, Federal Aviation Administration, no additional evidence having been received by the Court, arguments having been presented, and the Court having issued its minute order, which was signed and filed on September 11, 1980,

IT IS ORDERED that:

1. The petition filed in this action for a peremptory writ of mandamus is denied; and

2. The alternate writ of mandamus issued in this action on December 29, 1978, is discharged; and

3. Petitioner shall take nothing by this action; and

4. Respondent shall recover its costs in this action in the amount of $308.30.

Dated: October 24, 1980.

/s/ IRA A. BROWN, JR.
Judge of the Superior Court
City and County of
San Francisco

Before the
Occupational Safety and Health Appeals Board
Department of Industrial Relations
State of California
Docket No. 77-R1D3-658

In the Matter of the Appeal of:
United Airlines
San Francisco International Airport
San Francisco, California 94128
Employer.

DECISION
JURISDICTION

I

This matter came on regularly for hearing before Robert L. Harvey, Presiding Administrative Law Judge of the California Occupational Safety and Health Appeals Board, at San Francisco, California, on December 2, 1980, at 9:00 a.m. The Employer was represented by Linda S. Puvogel, Attorney. The Division of Occupational Safety and Health (the Division) was represented by Ruth M. Friedman, Staff Counsel. Robert Anderson appeared on behalf of Local 1781, International Association of Machinists. Oral and documentary evidence was introduced at the hearing; and the parties requested and were granted leave until January 5, 1981, to file written briefs, at which time the matter was submitted.

II

On June 10, 1977, and June 22, 1977, W. R. Klemens, Compliance Safety Engineer of the Division, conducted an inspection at the San Francisco International Airport, San Francisco, California (the site). On June 27, 1977, the Division issued to the Employer Citation No. 1 alleging a general violation of Title 8, California Administrative Code, Section 3666(a). A proposed civil penalty was not assessed by the Division.

III

The Employer has filed a timely appeal from the Citation contesting the existence of the alleged violation and the jurisdiction of Cal/OSHA.

LAW AND MOTION

1. At the hearing, the Division moved, without objection, to amend the charged section number from 8 Cal. Adm. Code 3666(a) to 8 Cal. Adm. Code 3339(a). This motion was granted.

2. At the hearing, the Employer moved, without objection, to withdraw its appeal as to the existence of the alleged violation. This motion was granted, leaving in issue the jurisdiction of Cal/OSHA.

JURISDICTIONAL ISSUE

Summary of Evidence

The unchallenged violation of 8 Cal. Adm. Code 3339(a) deals with LD-3 cargo containers used to handle cargo in aircraft. The described hazard involved damage to the doors of the LD-3 cargo containers. The employees of the Employer were exposed to the hazard while handling the

containers on the ground under a contract arrangement with Philippine Airlines (PAL).

The Employer's Director of Ground Safety, Wilson Applegate, testified that the Employer prepares and submits manuals to the Federal Aviation Administration (FAA), and that such manuals contain instructions and information relating to the safety of employees. Employee safety information in the manual relates directly to LD-3 cargo containers. Standards are established for the containers, and action is specified if a container does not meet the standards. The manuals have been prepared and maintained pursuant to FAA regulations requiring the manuals, and the FAA has reviewed and accepted the manuals. The manuals are not given to each employee but are on microfilm and are available to employees. Mr. Wilson testified that there are at least two FAA inspectors assigned to the Employer's maintenance base and two inspectors assigned to the terminals.

Evidence presented described the Employer's efforts to correct the damaged LD-3 containers. On July 27, 1977, the FAA issued a letter to the Employer stating that a July 15, 1977, inspection had revealed four unserviceable containers, and that corrective action was required. The Division put into evidence a memo of a call from the Employer's attorney to Mr. Mayfield, FAA Principal Operations Inspector, asking the FAA for help in putting pressure on PAL to repair the containers. The memo states:

> "The main reason being that California OSHA has issued United a citation because the LD-3s are in the United ramp area and OSHA considers it to be a United Airlines' problem. United has advised CAL/

OSHA that it falls under the jurisdiction of the FAA because they are type certificated containers and considered part of airplane equipment, and I agree."

The Division produced evidence that an employee had submitted a formal complaint regarding faulty cargo container door hinges in December, 1975, and that nothing was done to eliminate the hazard until after the Division's inspection in June, 1977, although some of the containers had been taken out of service by the Employer. Two employees during the period in issue testified that they had not observed an FAA inspector conducting an employee safety inspection.

Findings and Reasons for Decision

The FAA did not exercise safety and health jurisdiction pursuant to Labor Code Section 6303(a) regarding the violation of 8 Cal. Adm. Code 3339(a).

CAL/OSHA properly exercised safety and health jurisdiction regarding the loading and ground movement of LD-3 cargo containers.

The Employer contends that § 605(a) of the Federal Aviation Act, 49 U.S.C. § 1301, et seq., preempted the entire field of safety by the granting of exclusive jurisdiction to the FAA. Examination of the Act does not support this contention. As pointed out by the Division, § 601 of the Act, 49 U.S.C. § 1421(a), deals with flight safety and air commerce as the areas the FAA is authorized to regulate on an exclusive basis. Although the LD-3 cargo containers involved in this case were utilized by PAL in flight, the hazard described was a ground hazard. No evidence presented indicated that the elimination of the hazard would have any impact (adverse or otherwise) upon flight operations.

The Division also points out that the jurisdiction of the FAA is not totally exclusive in all matters affecting air commerce as evidenced by 49 U.S.C. § 1301, et seq., and 45 U.S.C. § 151, et seq., which grants jurisdiction in described areas to the Civil Aeronautics Board and handling of labor management relations under the Railway Labor Act. The Federal Occupational Safety and Health Act and the related California Occupational Safety and Health Act are examples of later enacted legislation specifically aimed at a later recognized mandate to insure the health and safety of employees where such objectives have not been effectively dealt with.

The evidence presented established that employee safety is merely included in a manual that appears to primarily relate to air safety. There is no adequate indication in the FAA manual requirements that ground safety of employees be dealt within the required manuals. Additionally, the basis of the assertion by the FAA representative that the FAA has safety jurisdiction was predicated upon the fact that he considered the cargo containers to be part of the airplane equipment and ignored the fact that the exposure to the hazard in this case did not relate directly to flight operations. The ground operations, which constituted the exposure to the identified hazards, were clearly not directly related to flight operations. Additionally, the evidence established the cargo containers were used in flight only by PAL (which may be assumed to be a foreign airline) and not this Employer, which had only ground-handling operations pursuant to a contract agreement.

The Employer contends that the FAA was actively exercising jurisdiction within the meaning of Labor Code

§ 6603. The facts of this case do not support this contention. The manual, which was prepared by the Employer, was not shown to contain any minimum standards relating to employee safety and only deemed approved by the absence of any adverse comment by the FAA review. The testimony by the employee that direct action to cure the hazards that he had complained of in 1975 were only responded to after Cal/OSHA made its inspection do not support the contention of active or effective FAA employee safety jurisdiction and enforcement. Additionally, the July, 1977, inspection by the FAA appears to have been in response to the Employer's request for assistance. It is difficult to conclude that an effective safety and health program for employees is one in which an employer must ask the regulatory agency to conduct an inspection so that the employer would have a valid reason to prevent its employees from being exposed to a hazard.

The Federal OSHA Review Commission case of *Northwest Airlines,* OSHRC Docket No. 13649 (appeal pending), has been noted; but, in addition to the dissimilar factual situation, the case holding is contra to a previous decision of the Appeals Board (*United Airlines,* Docket No. 76-878, November 27, 1978) and other airline jurisdiction cases from this agency.

For the reasons set forth above, it is concluded that Cal/OSHA engaged in a valid exercise of jurisdiction, and such jurisdiction was not limited or invalidated by any vesting or exercise of safety and health jurisdiction by the FAA.

Decision

The appeal is denied.

/s/ ROBERT L. HARVEY
Presiding Administrative
Law Judge

RLH:en
Dated: February 4, 1981

United States Court of Appeals
For the Ninth Circuit
No. 79-4489

United Air Lines, Inc.
Plaintiff-Appellee,

vs.

The Division of Industrial Safety of the Department of Industrial Relations of the State of California and the Occupational Safety and Health Appeals Board for the State of California,
Defendants-Appellants.

On Appeal From the United States District Court
For the Northern District of California

OPPOSITION OF UNITED AIR LINES, INC. TO MOTION FOR A STAY PENDING APPEAL

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III

APPELLANTS ARE NOT LIKELY TO SUCCEED ON THE MERITS

This action involves an analysis of the duties and responsibilities of the Federal Aviation Administration ("FAA") under the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1301, *et. seq.* ("Aviation Act"), and the effect which the carrying out of those duties and responsibilities has on the jurisdiction of CAL/OSHA, under its organic statute, the California Labor Code §§ 148-149, 6300 *et. seq.* It is not a case of Federal pre-emption; it is a case of statutory pre-emption since the law requires that the proper exercise of FAA jurisdiction precludes the continuing exercise of CAL/OSHA jurisdiction in the same "place of employment."

A. CAL/OSHA Is Without Safety and Health Jurisdiction Over United's Operations and Maintenance Facilities

1. CAL/OSHA Has No Jurisdiction Where A Federal Agency Is Otherwise Empowered To Act.

The federal Occupational and Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.*, preempts state regulation

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[4]CAL/OSHA has requested that this Court take judicial notice of certain testimony concerning the FAA's jurisdiction. United objects to the propriety of adding to the record before this Court and also submits that these materials have been taken out of context and are not properly within Rule 201 of the Federal Rules of Evidence. Nevertheless, the FAA's position is discussed, *infra.* it is entitled to a stay.

United States Court of Appeals
For the Ninth Circuit
No. 79-4489

United Air Lines, Inc.
Plaintiff-Appellee,

vs.

The Division of Industrial Safety of the Department of Industrial Relations of the State of California and the Occupational Safety & Health Appeals Board for the State of California,
Defendants-Appellants.

On Appeal From the United States District Court
For the Northern District of California

BRIEF OF PLAINTIFF-APPELLEE UNITED AIR LINES, INC.

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paragraph 2 of United's Verified Complaint, (CR. 1). Jurisdiction asserted under 28 U.S.C. §§ 1331 and 1337 is challenged herein by appellants.[5] The standards for determining whether a federal question is involved are essentially the same under both statutes, although 28 U.S.C. § 1337 jurisdiction depends on the case "arising under any Act of Congress regulating commerce". The instant action clearly presents a predominant federal question as well as one which arises under a federal statute which regulates commerce, i.e., The Federal Aviation Act.

The application of the exemption provision of the CAL/OSHA statute depends entirely on interpretation of federal law. If the Federal Aviation Act provides safety and health jurisdiction to the FAA and the FAA exercises that jurisdiction,[6] CAL/OSHA is without concurrent authority under the exemption terms of its own statute. No interpretation of state law is necessary.

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[5]United mistakenly asserted jurisdiction under 28 U.S.C. § 1332 (diversity of citizenship) but no longer relies on that section.

[6]Even negative exercise of its jurisdiction serves to deprive CAL/OSHA of jurisdiction. See *Secretary of Labor v. Consolidated Rail Corp.* OSHRC Docket No. 78 5805, CCH OSHA Paragraph 23,363 (1979) in which the Federal Railroad Administration declined to require guardrails around service pits and the Occupational Safety and Health Review Commission ("OSHRC") held that such non-action was sufficient to oust FED/OSHA of jurisdiction.

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Nov. 11, 1977

OSHA Program Directive # 77-5

OSHA Instruction
October 30, 1978

To: Regional Administrators
Assistant Regional Administrators

Through: Donald E. MacKenzie, Field Coordinator

From: Richard P. Wilson

Subject: Reference Book on Jurisdictional Issues

1. Purpose. The purpose of this directive is to replace Field Information Memoranda #75-39, #75-39A, #75-39B which transmitted copies of the "Reference Book on Jurisdictional Issues" and amendments thereto. The content of the FIM's has been combined and updated to reflect current conditions.

2. Program Directives Affected. Field Information Memoranda #75-39, #75-39A, #75-39B are replaced by this directive. Since sufficient copies of the Reference Book have been previously transmitted, only an updated Table of Contents and one new Interagency Agreement are provided as attachments to this directive.

3. Background. It is OSHA's position that a State has jurisdiction in occupational safety and health issues that are not specifically excluded in its approved plan. The State has the same scope of authority and responsibility for exercising that jurisdiction as would OSHA were the

plan not in effect. In carrying out their enforcement responsibility States may encounter problems involving two types of jurisdictional questions.

The first and more prevalent problem involves questions of whether OSHA has jurisdiction under Section 4(b)(1) of the Act. Section 4(b)(1) excepts from OSHA application those particular working conditions over which other Federal agencies have exercised their statutory authority by promulgating enforceable occupational safety and health standards applicable to those particular working conditions (hazards). Approved States are expected to exercise jurisdiction over all working conditions unless another Federal agency is clearly exercising its authority.

Section B, Jurisdictional Interpretations, of the Reference Book contains documents that present OSHA's interpretations of where jurisdiction lies in relation to certain Federal agencies. Where appropriate, States should use these documents for guidance in determining the extent of OSHA jurisdiction. States are free to honor these Federal limitations on OSHA's jurisdiction as State limitations. However, Section 4(b)(1) limitations are strictly binding only on the Federal program. Therefore, a State may choose to exercise greater jurisdiction under its own law than is allowed to Federal OSHA. Any maximum limitation on State jurisdiction would be determined under the State law and other Federal law and applicable court decisions.

(In a related development, the Consumer Product Safety Commission, the Environmental Protection Agency, the Food and Drug Administration and OSHA have recently entered into an interagency agreement with the goal of

increased cooperation in standards setting, enforcement, training, etc. A copy of this agreement is attached.)

The second jurisdictional problem involves the question of "exclusive Federal jurisdiction" over private contractors on certain Federal properties. In this situation there is not a question of whether OSHA or another Federal agency has jurisdiction, but whether OSHA may pass its jurisdiction on to a State through an approved State plan. Exclusive jurisdiction exists on certain limited Federal property where such jurisdiction has been reserved by the Federal government or ceded by the State to the Federal government. In such cases specific Congressional action would be required to permit State regulation of private employers working on these Federal properties. While it has been OSHA's position that the necessary Congressional action was taken through the enactment of Section 2(b)(11) and 18 of the Act, whereby States were invited to cover the same class of employers as the Federal program, a recent Federal district court decision in Minnesota has challenged this interpretation.

4. Action.

a. In any case where a State inspector is denied entry on the basis of a 4(b)(1) jurisdictional question, the State should pursue entry in one of the following ways:

1. A State may seek a court order enforcing its right of entry. In this case the Region should be notified of the State action and kept informed of the progress of the suit. OSHA will provide legal advice if requested by the State.

2. A State may take advantage of the Federal procedure for determining jurisdiction under Program Directive

#200-2, "Handling Jurisdictional Complaints . . ." contained in Section A2 of the Reference Book. States choosing this alternative should contact the Regional Office to initiate action under the Federal procedure.

b. In cases involving claims of exclusive Federal jurisdiction over private contractors on Federal property (military bases, national parks, etc.), Program Directive #77-6, "Application of State Safety and Health Provision to Private Employers in Areas of Exclusive Federal Legislative Jurisdiction," should be referred to for specific directions. That directive should be incorporated into Section A3 of the Reference Book.

c. The attached CPSC/EPA/FDA/OSHA agreement is provided for information and should be added, as Section C-9, to the Reference Book.

d. Regional Administrators should assure that State designees have received copies of this updated directive as well as Program Directive #77-6 and should assist them with any specific problems.

5. Filing. This Directive is effective immediately and remains in in effect until further notice.

Attachments:

Table of Contents
Interagency Agreement (C9)

Originator: OCS

Distribution:

A-1, B-2, C-2, D-4 and 5, E-1, HEW-1, NIOSH Regional Program
Directors-1, NACOSH-1, Training Institute-4

Before the
Occupational Safety and Health Appeals Board
Department of Industrial Relations

State of California

Docket No. 76-R1D3-878

In the Matter of the Appeal of:

United Airlines—SFOCG
San Francisco International Airport
San Francisco, California 94128
Martin A. Soll, Attorney at Law
Petitioner.

GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

The Occupational Safety and Health Appeals Board, acting pursuant to authority vested in it by the California Labor Code, hereby grants the Petition for Reconsideration filed by the Petitioner, and makes the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

On June 16 and 17, 1976, a representative of the Division of Industrial Safety (the Division) conducted an inspection of a place of employment at San Francisco International Airport, San Francisco, California. As a result of this inspection, a citation was subsequently issued to Petitioner

herein, United Airlines—SFOG, for an alleged violation of Title 8, California Administrative Code, Section 3642(a)(1). A proposed civil penalty of $110 was issued to Petitioner on July 27, 1976.

Petitioner filed a timely appeal with the Appeals Board contesting the citation and the civil penalty. The matter was docketed for hearing, and on November 3, 1976, the hearing was conducted in San Francisco, California. The appeal was submitted for decision on December 23, 1976, after the submittal of closing briefs. On January 24, 1977, the Administrative Law Judge issued a decision denying the appeal in its entirety. On January 28, 1977, a corrected decision was issued by the Administrative Law Judge.

On March 1, 1977, Petitioner filed a timely Petition for Reconsideration with the Appeals Board which was taken under submission by the Appeals Board on March 4, 1977. On March 14, 1977, the Division filed an Answer to the Petition for Reconsideration.

ISSUE

The Division issued Petitioner a citation alleging a violation of a safety order with respect to lack of guardrail protection for an employee performing work on an aircraft engine. The only issue is whether the Division's jurisdiction to issue the citation has been precluded by the vesting of such jurisdiction in the Federal Aviation Administration (FAA).

REASONS FOR DECISION
AFTER RECONSIDERATION

The violation allegedly occurred while a United employee was performing a borescope inspection on a DC-10 airliner in the ramp area at the San Francisco International Airport. Petitioner maintains that the State's jurisdiction is preempted by the FAA for the following reasons:

1. The safety jurisdiction of airline employees, including aircraft ground maintenance employees, is vested in the FAA. Labor Code Section 6303(a); 29 U.S.C. 651, 653; *The Federal Aviation Act of 1958,* 49 U.S.C. 301, et seq.

2. It is not necessary that the FAA actually exercise its authority in matters of airline employee safety including aircraft maintenance personnel. It is sufficient that the FAA is vested with such power to preclude State jurisdiction.

3. Even if the FAA is required to exercise its authority in order to preempt the State, it has fulfilled any such requirement by issuing regulations with respect to aircraft maintenance, including safety of ground maintenance personnel. These regulations require airlines to submit maintenance manuals to the FAA which must include other information or instructions relating to safety. (14 C.F.R. 121.135(b).)

4. Matters relating to the size of maintenance manuals, how they are approved, what approved methods are employed, or even the manner of enforcement by the FAA, are all irrelevant to the question of "exercise."

As to Petitioner's first two points, the Appeals Board has applied, and continues to apply, a jurisdictional test as to whether another State or Federal agency is actually exercising safety jurisdiction in a given circumstance before the State's safety authority is declared preempted. (*Southern Pacific Transportation*, Cal/OSHA Docket Nos. 74-R2D3-193, 194, 195, and 74-R3D1-393, Decision After Reconsideration, October 28, 1975.) Although we acknowledge that this may be contrary to the trend of recent Federal OSHA cases, our reading of both Federal and State law indicates that both Congress and the Legislature intended that if employees were to be exempted from OSHA or Cal/OSHA protection, they should not be left with a mere token or recital of safety protection. Hence, the "actually exercising" test is applied with regard to State or Federal agencies vested with employee safety responsibility.

Evidence in this case was presented that FAA regulations require air carriers like Petitioner to submit maintenance manuals for approval which must include other information or instructions relating to safety. In fact, a copy of United's maintenance manual had a provision similar to the section cited. The FAA may disapprove of a manual in whole or in part, but no specific guidance regarding employee safety provisions or their enforcement are provided by the FAA; and, approval is assumed by the FAA's failure to disapprove.

In regard to the enforcement of employee safety requirements, Petitioner presented evidence that FAA representatives inspect its facilities and operations; and, reportedly,

an inspector may take action for possible violation of employee safety requirements contained in the manual. The evidence failed, however, to show that the FAA actually does exercise such authority in matters affecting employee safety. In fact, without convincing evidence to the contrary, the Division's contention that the FAA exercises safety jurisdiction as to the aircraft itself, passengers, and cargo, but not employee safety, is supported by the evidence presented.

Accordingly, the Division properly exercised safety jurisdiction in issuing Petitioner a citation for failure to adequately protect an employee on an elevated work platform from a fall based on the lack of evidence that the FAA actually exercised employee safety jurisdiction in such circumstances.

DECISION AFTER RECONSIDERATION

The Decision of the Administrative Law Judge in this matter dated January 24, 1977, is affirmed.

/s/ HAROLD MITCHELL
Chairman

/s/ MARK K. BOWERS
Member

Occupational Safety and Health Appeals Board

Nov. 27, 1978